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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1023

CITY NATIONAL BANK AND TRUST COMPANY OF COLUMBUS, Administrator w w a of the Estate of Bess M. Kelly, deceased, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 14a-22a) are reported at 203 F. Supp. 398. The opinion of the Court of Appeals (Pet. 19-20) is reported at 312 F. 2d 118.

JURISDICTION

The judgment of the Court of Appeals was filed on January 23, 1963. (Pet. 21.) A timely petition for

rehearing was denied on February 18, 1963. (Pet. 21.) The petition for a writ of certiorari was filed on April 16, 1963. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether contingent bequests to specified charities qualify for the estate tax exemption granted by Section 812(d) of the Internal Revenue Code of 1939 when the contingency is satisfied 80 days after the death of the testatrix by the death of the primary beneficiary without issue.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of Sections 810 and 812 of the Internal Revenue Code of 1939 and Sections 81.44 and 81.46 of Treasury Regulations 105 (1939 Code) are set forth in the Appendix, *infra*, pp. 8-11.

STATEMENT

Bess M. Kelly died testate on November 24, 1952. (R. 14a.) By Item XI of her will, she bequeathed her residuary estate in trust. The net income of the trust was to be accumulated until her adopted son, Dennis R. Kelly, reached the age of 21. Thereafter, while the trust continued, the son was to receive $5,000 yearly, plus such further amounts for support and maintenance as the trustee deemed necessary. (R. 11a, 15a.) When the son reached the age of 45, the trust was to terminate and he was to become the owner of the trust property. If he died before the

age of 45, the trust was to continue for the benefit of his surviving wife, child or children. (R. 12a.)

The will also provided that if the son died before reaching the age of 45, leaving neither wife nor surviving child or children, the trust was to terminate and the trust property was to be distributed equally to six enumerated beneficiaries, all of which were organized and operated exclusively for the religious, charitable, or educational purposes described in Section 812(d) of the Internal Revenue Code of 1939. (R. 12a-13a, 15a-16a.)

On February 12, 1953, 80 days after the death of the testatrix, the son, 20 years of age, died intestate leaving neither wife nor child surviving him. The residue of the estate (less certain items not relevant here) was distributed to the specified charities. No part of the trust property was ever distributed to the son or to his estate. (R. 16a.)

In rejecting the claim that the estate was entitled to deductions in the amounts distributed to the charities, the District Court held that the son's death was not, within the meaning of Section 812(d) of the 1939 Code, a "disclaimer" of the bequest made to him and that the charities, being mere contingent beneficiaries, were not entitled to any specific and ascertainable amounts at the time of the decedent's death. (R. 19a-22a.) The Court of Appeals affirmed, *per curiam*. (Pet. 19-20.)

ARGUMENT

The decision below is correct. There is no conflict in decisions and no occasion for review by this Court.

1. In computing the estate tax imposed by Section 810 of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 8), Section 812(d) (Appendix, *infra*, p. 8) allows a deduction for bequests and other testamentary transfers to certain so-called charitable organizations. But no deduction is permitted if the bequest is contingent upon the happening of a future event as of the date of the testator's death—unless the possibility that the charitable organization will not take is so remote as to be negligible. *Commissioner* v. *Sternberger's Estate*, 348 U. S. 187, 192-194; Section 81.46 of Treasury Regulations 105 (Appendix, *infra*, p. 11). That was not the case here; from the terms of the will and the age of the son at the time of the testatrix's death, it was highly probable that the charities would not take. Under the controlling Regulations, with the single exception of a timely and effective disclaimer by the primary legatee, the situation as of the moment of the testatrix's death governs the deductibility of conditional bequests to charitable organizations. *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, 154-155; *Lincoln Rochester Trust Co.* v. *McGowan*, 217 F. 2d 287, 293 (C. A. 2d); *First Trust Co. of St. Paul State Bank* v. *Reynolds*, 137 F. 2d 518 (C.A. 8th); *Mississippi Valley Trust Co.* v. *Commissioner*, 72 F. 2d 197 (C. A. 8th), certiorari denied, 293 U. S. 604; *United States* v. *Fourth Nat. Bank in Wichita, Kan.*,

83 F. 2d 85 (C. A. 10th), certiorari denied, 299 U. S. 575; *Estate of Kirkwood* v. *Commissioner*, 23 B.T.A. 955, 965-966; see also Treasury Regulations 105 (1939 Code), Section 81.44 (Appendix, *infra*, pp. 9-11).

Nor did the son's death constitute a "disclaimer" within the meaning of Section 812(d). That term, in its ordinary and commonly understood sense, connotes an act renouncing or repudiating some interest or property. *Brown* v. *Routzahn*, 63 F. 2d 914, 916 (C. A. 6th), certiorari denied, 290 U. S. 641; Black's Law Dictionary (4th ed., 1951), p. 550; *Crane* v. *Commissioner*, 331 U. S. 1, 6. There was no evidence here that the son contemplated disclaiming the bequest to him while he lived, and his death of course precluded any renunciation. *Brown* v. *Routzahn*, *supra*, p. 916; 4 Page on Wills (3d ed.), Sec. 1407.[1]

2. There is no conflict with other decisions. The cases upon which petitioner relies, in asserting conflict, are inapposite. *Commissioner* v. *Shively's Estate*, 276 F. 2d 372 (C. A. 2d), involved deduction of a claim under Section 812(b) of the 1939 Code which pertains to expenses and claims which may arise after

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[1] The petitioner's reliance (Pet. 15-18) on the last sentence of Section 2055(a) of the 1954 Code is misplaced. That provision refers only to the termination by reason of death or other cause of an unexercised *power* to divert to private uses property bequeathed to charity. Thus, it cannot apply here, where the charities took upon the termination of a private bequest by reason of death. See Lowndes and Kramer, *Federal Estate and Gift Taxes* (1956), p. 360; Casner, *Estate Planning Cases, Statutes, Text and Other Materials* (2d ed., 1960 Supp.), pp. 252-253; 2 Casner, *Estate Planning* (3d ed., 1961), pp. 890-892, fn. 29, pp. 892-893.

the death of the testator and during the administration of the estate. See *Jacobs* v. *Commissioner*, 34 F. 2d 233, 236 (C. A. 8th), certiorari denied, 280 U. S. 603. *Marine Midland Trust Co. of Southern N. Y.* v. *McGowan*, 223 F. 2d 408 (C. A. 2d), involved an unconditional bequest to a charity which the testator believed to be in existence. (Pet. 9-10.) Any uncertainty that the charity in that case would take did not arise from the language of the bequest. The question in *Commissioner* v. *Macaulay's Estate*, 150 F. 2d 847 (C. A. 2d), was whether a disclaimed specific legacy falling into a residuary estate bequeathed directly and unconditionally to charity qualified for deduction. (Pet. 10.) In permitting the deduction, the court relied (*id.* at 851) on cases where a statutory right to take in derogation of a direct bequest to charity had been released or renounced and the only contingency affecting the charitable bequests arose from the questioned efficacy of the will as an instrument of transfer. See *Commissioner* v. *First Nat. Bank*, 102 F. 2d 129, 131 (C. A. 5th); *Humphrey* v. *Millard*, 79 F. 2d 107, 108 (C. A. 2d). The will contest cases relied on by the petitioner (Pet. 11) are based on the same considerations as the statutory right cases and are thus similarly distinguishable from the instant case.

3. No problem of administrative importance is presented by the decision in the instant case. It represents only the application of a well-settled principle of law to a somewhat unusual and non-recurring situation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY, 1963.

APPENDIX

Internal Revenue Code of 1939:

SEC. 810. RATE OF TAX.

A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net estate * * *.

* * * *

(26 U.S.C. 1952 ed., Sec. 810.)

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, * * * by deducting from the value of the gross estate—

* * * *

(d) [as amended by Sec. 408(a), Revenue Act of 1942, c. 619, 56 Stat. 949] *Transfers for Public, Charitable, and Religious Uses.* — The amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made prior to the date prescribed for the filing of the estate tax return * * *) to or for the * * * use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. * * * * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 812.)

Treasury Regulations 105 (1939 Code):

> Sec. 81.44 [As amended by T. D. 5239, 1943 Cum. Bull. 1081; T. D. 5351, 1944 Cum. Bull. 579; T. D. 5906, 1952-1 Cum. Bull. 155] *Transfers for public, charitable, religious, etc., uses.*— Deduction may be taken of the value of all property transferred by will or by the decedent in his lifetime * * * if in either case the property was transferred (1) to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes; or (2) to or for the use of any corporation or association organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * *.
>
> The amount of the bequest, legacy, devise, or transfer, for which a deduction is allowable under the provisions of this section, includes the interest which falls into any such bequest, legacy, devise, or transfer, as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made (1) prior to September 1, 1944, in the case of decedent dying on or before October 21, 1942, the date of the enactment of the Revenue Act of 1942, or (2) prior to the date prescribed for the filing of the estate tax return in the case of a decedent dying after October 21, 1942. The disclaimer must not only be made (1) prior to September 1, 1944, in the case of a decedent dying on or before October 21, 1942, or (2) prior to the date prescribed for the filing of the estate tax return (including such date as may be prescribed in an extension of time

granted for the filing of such return) in the case of a decedent dying after October 21, 1942, but must be irrevocable at the time the deduction is allowed. Ordinarily, a disclaimer made by a person not under any legal disability will be considered irrevocable when filed with the probate court. A disclaimer is a complete and unqualified refusal to accept the rights to which one is entitled. Thus, if the beneficiary uses these rights for his own purposes, as by receiving a consideration for his formal disclaimer, he has not refused the rights to which he was entitled. There can be no disclaimer after an acceptance of such rights, expressly or impliedly. The disclaimer of a power described in this paragraph is to be distinguished from the release or exercise of a power. In the case of the estate of the creator of a power, the release or exercise of the power by the donee of the power in favor of a person or object described in the preceding paragraph does not cause any deduction under this section of the value of the property subject to such power. See section 81.46.

* * * *

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * * Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay

the principal to a charitable corporation, the present value of the remainder is deductible.

* * * *

Sec. 81.46 *Conditional bequests.*—If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.